No. 12,843

United States Court of Appeals
For the Ninth Circuit

ILENE CHARLES, also known as Arlene Charles,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

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JURISDICTION.

Title 18, *U. S. Code,* Sec. 3281 confers jurisdiction on the District Court and Title 28, Sec. 1291 grants appellate jurisdiction to this Honorable Court.

STATEMENT OF FACTS.

Appellant was convicted in the District Court for the Territory of Hawaii of violation of the Harrison Anti-Narcotic Law (26 *U. S. Code,* Sec. 2553(a)) and has appealed.

The case was tried in the District Court jury-waived, and the witnesses for the prosecution were two officers, a Honolulu police officer and a federal narcotic officer. They testified they went to a dwelling house at 3237 Nimitz Highway in Honolulu on September 21, 1950. As they approached they saw appellant standing inside the hallway (R. pp. 11, 18). She slammed the door on the officers, but this did not stop them from entering the house (R. pp. 11, 18). They found her in the bathroom, her hand in the commode (R. p. 18). Officer Cain recovered three capsules of heroin from the water in the commode (R. p. 19). Two other capsules of the same drug were found in the house (R. p. 11).

Several other persons lived in, or had access to, the house (R. pp. 12, 20, 21). But appellant was arrested and charged with the purchase of the drug. She made no statement incriminating herself, refused to answer any questions (R. p. 16).

SPECIFICATION OF ERRORS TO BE URGED.

1. The evidence adduced in the trial of the above-entitled matter was insufficient to establish the guilt of appellant and appellant should have been discharged by the trial court.

2. The search of the premises occupied by appellant and others on September 21, 1950, resulted in the finding and seizure of certain alleged narcotics. That on the trial of the above-entitled matter, the

alleged drugs seized were not offered in evidence, no proof was adduced that appellant owned or possessed said drugs, and in lieu of evidence her conviction was obtained by multiple presumptions, pyramided on each other as follows: (a) the presumption that the narcotics found in the dwelling belonged to appellant, (b) the presumption that they were not in or from the original stamped package, (c) the presumption that she purchased them, and (d) the presumption that they were purchased in the District of Hawaii. Competent evidence of appellant's guilt of the charge contained in the information being absent, the court erred in finding her guilty.

3. No facts or circumstances were developed in the trial of said cause which tended to show that the alleged narcotic drugs referred to in the information were purchased by appellant in the District of Hawaii, and in the absence of such facts and circumstances there was no proof of venue, and the trial court was without jurisdiction to proceed to judgment and sentence in this matter.

4. The prosecution did not put in evidence for identification and as part of its proof the alleged narcotics mentioned and described in the information, and by reason of its failure to do so the evidence against appellant was insufficient to support the decision and judgment herein, and appellant should have been discharged.

5. Because of the failure of the prosecution to offer in evidence for identification and as part of its

proof the narcotics mentioned and described in the information, appellant was entitled to the benefit of the favorable presumption that, if offered, said narcotics would have negatived rather than supported the charge in the information, and an order and judgment should have been entered by the trial court discharging her.

6. The prosecution failed to show that the narcotics mentioned and described in Exhibit "A" were the same narcotics alleged to have been found September 21, 1950, in the dwelling house where appellant was arrested on said day by William K. Wells, witness for the prosecution.

ARGUMENT.

1. NO EVIDENCE OF VIOLATION.

The court erred in finding appellant guilty for the reason that no evidence was offered to support the averment that the drugs were not in or from an original stamped package and the drugs themselves were not produced and put in evidence to speak for themselves on this point; and in the absence of such evidence, either parol or physical, appellant was entitled to the benefit of the presumption of innocence and should have been discharged.

Nothing occurred in the trial which overcame this presumption. The police officer (R. p. 19) and narcotic officer (R. p. 11) testified that they found a few capsules of heroin in a house where appellant was

at the moment, but no claim was made that it was not in or from a stamped package; and the prosecution chose not to produce and offer the alleged narcotics as evidence in the case.

The Harrison Anti-Narcotic Act (26 *U. S. Code,* Sec. 2553(a)), under which appellant was charged, is a revenue measure. It does not make the mere possession of narcotics a crime. There must be absence of appropriate revenue stamps for possession to ripen into a criminal offense.

U. S. v. Jin Fuey Moy, 241 U.S. 394, 36 Sup. Ct. 658;

Linder v. U. S., 268 U.S. 5, 45 Sup. Ct. 446

Under the Act, the burden of proof is on the prosecution to prove the drug involved was not in or from an original stamped package. In *Weaver v. U. S.,* 15 Fed. (2d) 38, defendant was charged with violating this Act. The court said:

> "Count 3 charged him with the sale of morphine which was not then and there sold in the original stamped package, nor from such original stamped package. On the trial of the cause evidence was introduced tending to prove that defendant was in possession of the morphine, that he sold morphine to C. H. Spearman, *but no evidence was offered tending to prove that the package of morphine in defendant's possession, or the package in or from which he sold the drug to Spearman, was unstamped. A package was handed to the witness, Spearman, who identified it as the package containing morphine purchased from the defendant, but the package itself was not in-*

troduced in evidence, nor does it appear from the record that it was exhibited to the jury."

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2. INFERENCE FROM WITHHOLDING EVIDENCE.

Special significance should be attached to the fact that the prosecution chose not to produce and put in evidence the articles seized, including the alleged capsules of heroin. The inference is that their production would not have been favorable to the prosecution.

Where a party has it peculiarly within his power to produce evidence to clarify a point and he elects not to do so, the inference is that the evidence if produced, would have been unfavorable to that party.

Milton v. United States, 110 Fed. (2d) 556;
United States v. Walker, 152 Fed. (2d) 612;
Morei v. United States, 127 Fed. (2d) 827;
Clayton v. United States, 152 Fed. (2d) 402;
United States v. Doores, 58 Fed. Supp. 491.

Here, we submit, where appellant was expressly charged with purchase of certain heroin not in or from the original stamped package, and the prosecution having offered no parol evidence in support of the gravamen of the offense, viz.: that it was not in or from an original stamped package, the failure of the prosecution to produce and put in evidence the drug in question, leaves the charge against appellant unproved, the presumption of her innocence prevails, and she should have been discharged.

3. NO EVIDENCE OF VENUE.

Stripped of unnecessary verbiage, appellant was charged with purchasing on September 21, 1950, certain narcotics not in or from the original stamped package. The Harrison Anti-Narcotic Act sanctions a presumption of purchase where a person is found in possession of unstamped narcotics (Title 26, *U. S. Code,* Sec. 2553(a)). It is of course incumbent on the prosecution, seeking the benefit of this presumption, to prove the narcotics in question were in fact unstamped. In the case at bar, this was neither done nor attempted, and we submit, because of this circumstance, the presumption has no place in this case.

But even giving the prosecution the benefit of this presumption, no venue was shown. The presumption of purchase does not carry with it the presumption that the purchase occurred at the place of arrest or in the District or Territory of Hawaii. Appellant was arrested at 3237 Nimitz Highway, in Honolulu, but there is nothing in the evidence to show she lived there, or that she lived in the District and Territory of Hawaii. She was in the house when the officers came, and that is all there is on the subject. Under the circumstances, we submit, there is nothing in the record to show venue.

Cain v. United States, 12 Fed. (2d) 580;
Flowers v. United States, 83 Fed. (2d) 78;
Donaldson v. United States, 23 Fed. (2d) 178;
Brightman v. United States, 7 Fed. (2d) 532;
Acuna v. United States, 74 Fed. (2d) 359.

The facts here distinguish this case from *Casey v. United States,* 20 Fed. (2d) 752. The Supreme Court, in sustaining the decision of this court in that case (276 U. S. 413, 48 Sup. Ct. 373), pointed out that there were special facts in that case to submit the issue to the jury. Said the court:

> "But we are of opinion that upon the facts of this case the court was right. If the jury believed that the defendant, long established in Seattle, said that he had not the drug, but would, and shortly thereafter did, furnish it, the inference that he bought it in Seattle was strong * * *"

In this case, appellant made no statement whatever, there is nothing to indicate whether she lived in Honolulu or had just arrived by plane. We submit that venue was not proved.

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4. NO EVIDENCE OF APPELLANT'S POSSESSION OF DRUG.

The presumption created by the Harrison Anti-Narcotic Act that the possession of narcotics not in or from the original stamped package is *prima facie* evidence of purchase, contemplates that such possession should be personal and exclusive (see *Willsman v. United States,* 286 Fed. p. 852, and cases cited). The record does not show that appellant ever had such possession of the drug referred to in the information. The prosecution asked the court to infer possession from the fact that appellant was found

with her hand in the commode where the heroin capsules were floating (R. p. 19). There was no evidence she put the capsules there; no evidence that she wasn't as much opposed to their presence in the house as the officers. It has frequently been said that for possession of narcotics to be a crime, the possession must be conscious and willing (*Ezzard v. United States,* 7 Fed. (2d) 808). Several other persons lived in the house where the arrest was made and the drugs found, and the only apparent reason the officers chose to arrest appellant and not one or more of the other occupants was because she was nearer, measured by inches, to the floating drug than the others when the officers entered the bathroom. We do not believe criminal cases should be tried on surmises in place of evidence, as was done here, but we wish to point out that reasonable surmises based on appellant's conduct are more consistent with her innocence than guilt.

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5. INFERENCE ON INFERENCE.

It is respectfully submitted that the Harrison Anti-Narcotic Act does not authorize or contemplate such a chain of inferences or presumptions as were invoked in this case. *The Act provides for only a single inference or presumption.* Where drugs are found without the "appropriate tax paid stamps," the statute sanctions the presumption that they were purchased in violation of law. This is a presumption of fact (*Di Salvo v. United States,* 2 Fed. (2d) 222) and the

evidence must show either that they were not in an original stamped package or from one (*Flowers v. United States,* 83 Fed. (2d) 78). In this case, though presumably the prosecution had evidence at hand to clarify the point, it chose not to do so, which warrants the conclusion that, if produced, the evidence would have been unfavorable to the prosecution.

The prosecution has asked the court (1) to presume that the drugs were not in or from an original stamped package, and (2) to presume that they belonged to appellant, and (3) to presume that she purchased them in violation of law, and (4) to presume she purchased them in Hawaii. Such a chain of inferences and presumptions are wholly alien to the fundamental principles embraced in our concept of due process, and makes the strongest presumption of all—the presumption of innocence—meaningless.

CONCLUSION.

It is respectfully submitted, for the reasons set forth above, the decision and judgment of the court below should be set aside and appellant discharged.

Dated, Honolulu, Hawaii,
April 18, 1951.

Respectfully submitted,
E. J. Botts,
Attorney for Appellant.